OCTOBER TERM, 1920.

IN THE

SUPREME COURT OF THE UNITED STATES

SILVER KING COALITION MINES COMPANY, a corporation, *Petitioner.*

v

CONKLING MINING COMPANY, a corporation, *Respondent.*

Number 158.

PETITION FOR RE-HEARING.

To the Honorable Justices of the Supreme Court of the United States:

Comes now the Conkling Mining Company, respondent in the above entitled cause, and respectfully presents its petition for a re-hearing, and submits the following reasons why its prayer should be granted:

1. The Court, in its decision in the case, has fallen into a misapprehension as to the issues, and because of that, has overlooked and failed to decide an issue essential in the cause.

The controlling issue in this case, as the Court was lead to conceive it, was the question whether the patent in evidence properly construed, included the disputed strip of one hundred and thirty-five and one-half (135½) feet in width.

The Court says in this opinion:

> "If the patent properly construed does not cover the land in question, the case is at an end."

Herein the Court misconceived the case. A final decision to the effect that the patent, properly construed, does not cover the disputed strip would end the case so far as it affects the ore taken from beneath the disputed strip. But the Silver King Coalition Mines Company took from beneath the Conkling mining claim not only the ores taken from beneath the disputed strip, but it also took from the claim, valuable ore *east* of the line of the disputed strip and from *beneath the boundaries of the Conkling mining claim as the Silver King Company concedes it to be.* The accounting asked for in this suit, applied to the ore taken from the Conkling claim *east of the disputed strip* as well as to the ore taken from beneath the *disputed strip.*

In the answer of the petitioner herein, it asserted that the Conkling mining claim did not embrace the disputed strip, and throughout the answer the Conkling mining claim was referred to as the territory embraced within the description of the patent

after the exclusion of the strip in controversy.

In the answer of the said company to the amended bill of complaint (Supp. Trans. of Record, pp. 38 to 57), it is repeatedly admitted that the defendant company had extracted from beneath the surface of the Conkling mining claim, ores to a conceded value of $20,047.50. (See Supp. Trans. of Record, pp. 41, 42, 43, 44, 45.)

In the reply brief of the petitioner filed herein, on page 62, this fact again is admitted and the issue presented thereby is submitted to this Court as follows:

> "Some portion of the ore for which the petitioner has been compelled to account was taken from within the admitted boundaries of the Conkling mining claim immediately east of the strip in controversy. That ore the petitioner claimed the right to take by virtue of its ownership of the Crescent fissure vein, and that right was upheld by the learned chancellor before whom the title to the ore bodies in controversy was tried. We are content, without further written argument, to submit the correctness of that decision upon the arguments contained in our brief filed in support of the application for the writ, and will submit also, in like manner, all questions pertaining to the accounting had before Hon. Tillman D. Johnson."

The Silver King Coalition Mines Company claimed the right in its pleadings, to extract this ore from beneath the *conceded* boundaries of the Conkling mining claim, because it asserted that these ores were part of a vein which had its apex

within certain claims of the Silver King Coalition Mines Company, and that it could, therefore, follow the vein and extract ores therefrom. The apex of this vein along its course crossed the side lines of the claims of the Silver King Company, but the company asserted that it had the right to make the end lines of these claims its side lines, and to follow the vein beyond their end lines as located. This, upon the assertion that there was a mistake in locating the claims and they were laid across instead of along the discovery veins.

This constituted what is spoken of in the briefs as the "apex issue." And this issue controls the rights of the parties to the ore from beneath the Conkling claim *east of the disputed strip.*

The admission in the amended answer of the Silver King Coalition Mines Company that the ores taken from within the *conceded* boundaries of the Conkling claim amounted in value to $20,047.50 is no measure of the *real* value of such ore. The same answer asserted the value of the ore taken by the company from beneath the disputed strip to be no greater than $52,681.00 (Supplemental Transcript, p. 45), yet the value of a three-fourths (¾) interest in the ore taken from beneath the disputed strip and the conceded claim, amounted to more than $500,000, as found by both the lower courts.

By stipulation of counsel, to which the Court assented, it was *agreed* that the disputed question as to the *ownership of the land* and the disputed question as to the *ownership of the vein* were first to be tried, and that a *decree* should be entered upon *these issues,* and that if these issues should be resolved in favor of the plaintiff (respondent) an accounting would then be ordered (Supplemental Transcript, pp. 59, 66 and 67).

Pursuant to this agreement, the parties presented fully and completely their testimony, both as to the boundary issue and the apex issue. The testimony of both parties upon the apex issue is in the record, as is the testimony on the boundary issue. It is just as necessary that the apex issue be determined by this court in order to settle the rights of these parties, as it was to settle the boundary issue.

Manifestly, the only reason why the Court failed to take up and decide this apex issue which inheres in the case and is necessary to the determination of the rights of the parties and which was fully presented by the evidence and the arguments in the briefs, was because of the conception of the Court, to which we have alluded, that the issue as to the proper construction of the patent would be decisive of the case.

The failure of the decision to determine this apex issue places the Conkling Company in a truly unfortunate position. Unless the Court sees fit to grant this application this very issue must be *again* tried at very great expense and a final determination of it is deferred until such time as the question can, in due course, be presented again to this Court; an entirely *unnecessary* proceeding and an utterly futile one if the decision of the Circuit Court of Appeals on this issue can not be sustained.

This litigation has been in progress for more than ten years; it is submitted that when there is an issue in the case essential to be decided in order that the rights of the parties may be determined and established, and when that issue is presented upon the testimony and argument of both parties, the issue should be determined by this Court. Inasmuch as, through misapprehension, this issue was not determined by the Court, a re-hearing should be allowed.

Other considerations relating to the basis of the decision upon the true construction of the patent might well be urged, especially the far-reaching effect of the ruling that the notice respecting the application for a patent is jurisdictional, thus making all patents open to collateral attack upon an issue of fact. But aside from this, in view of the fact that it is manifest that the case has not been *fully decided,* in that one important and essential issue has not been determined, we submit that a re-hearing should be ordered in the case.

The record which is now before the Court was made by the parties in 1912 as the basis for the determination of their respective rights to the ore taken from the Conkling claim *east* of the disputed strip, as well as to the ore taken from beneath the disputed strip. It is submitted that after a case has been in litigation for so many years, and the testimony has all been taken and presented to this Court upon a record which was made expressly by the parties as the basis for the determination of their respective rights, every consideration calls for a determination by this Court of the essential issues involved in the case.

Your petitioner therefore humbly and respectfully prays that this case be restored to the docket and a reargument thereof be ordered.

WILLIAM D. McHUGH,
WILLIAM H. KING,
WILLIAM W. RAY,
FRANCIS B. CRITCHLOW,
Solicitors for Respondent.

Certificate of Counsel.

The undersigned, members of the Bar of this Honorable Court, humbly conceive that it is proper that the above cause should be re-heard by this Court if this Court shall see fit so to order, and they therefore respectfully certify accordingly.

WILLIAM D. McHUGH,
WILLIAM H. KING,
WILLIAM W. RAY,
FRANCIS B. CRITCHLOW,
Solicitors for Respondent.